

July 3, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Terry M. Apodaca

Date of Filing: May 20, 2008

Case Number: TFA-0258

On May 20, 2008, Terry M. Apodaca (Apodaca) filed an appeal from a determination issued to her on April 23, 2008, by the Department of Energy's (DOE) National Nuclear Security Administration's Service Center (SC). In that determination, SC responded to a request for documents that Apodaca submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. SC identified a number of documents responsive to Apodaca's request. Some of those documents were released in their entirety and, pursuant to Exemption 6 of the FOIA, others were released with some deletions. Apodaca has challenged the withholding of information under Exemption 6. Apodaca also challenges the extent of the search that was conducted for responsive documents. This appeal, if granted, would require SC to release the withheld information to Apodaca and conduct a more extensive search for documents.

I. Background

On August 29, 2007, Apodaca requested: (1) A copy of all documents relating to an investigation (and corrective actions) concerning an incident referred to in an E-mail message from Tyler Przybylek dated 3/14/07¹ (Przybylek E-mail), including any responsive documents in the offices of five specifically named employees (Category 1); and (2) a copy of the official FOIA file (Request No. 06-181-A) pertaining to the processing of a particular FOIA request (Category 2).

In its April 23, 2008, determination letter (Determination Letter) responding to Apodaca's request, SC provided Apodaca with one Category 1 document. SC also provided Apodaca with 39 Category 2 documents (numbered from 1 to 39).² SC withheld from Document Nos. 1-4, 10,

¹ The E-mail message references an incident concerning the improper release of information. The message goes on to state "[T]here [have] been multiple points of failure They will be investigated." Apodaca Appeal submission (August 29, 2007 FOIA Request from Terry Apodaca to Carolyn Becknell).

² The text of the letter indicated that there were 40 Category 2 documents while the list of Category 2 documents included in the letter described only 39 documents. Apodaca was only provided 39 Category 2 documents. Apodaca raised this difference as one of her grounds for appeal believing that SC had not provided her with a Category 2

21-25, 27, 29, 31,33, 35 and 36 information relating to the home address, telephone number and E-mail address of the individual who filed the request in Case No. 06-181-A). This information was withheld pursuant to Exemption 6 of the FOIA.

Apodaca challenges SC's determination on a number of grounds. First, Apodaca apparently challenges the withholding of information under Exemption 6 concerning the FOIA requester (the individual who filed the request in Case No. 06-181-A) from the various Category 2 documents, because contractor employee names, telephone and facsimile numbers, E-mail addresses and the name of the organizations they work for were not redacted from a number of Category 2 documents. Second, the Determination Letter did not specify that information was being withheld under Exemption 6 in Document Nos. 37 and 39. Third, Documents Nos. 22 and 35 were letters that indicated that each had an attachment, yet Apodaca was not provided a copy of these attachments. Lastly, she argues that SC failed to conduct a search for responsive documents at the Y-12 plant in Oak Ridge, Tennessee.

II. Analysis

A. Exemption 6

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See Sowell, Todd, Lafitte, Beard and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510); *Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499).³

document. Upon inquiry, SC has informed us that it found only 39 Category 2 documents and that the reference to 40 documents was in error. *See* E-mail from Carolyn Becknell, FOIA Officer, SC, to Richard Cronin, Attorney-Examiner, Office of Hearings and Appeals (May 30, 2008). Consequently, given SC's explanation as to the discrepancy, we need not address Apodaca's argument concerning a missing Category 2 document.

³ OHA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

As an initial matter, we must reject Apodaca's argument that, because SC released information in the Category 2 documents relating to federal contractor employees, SC should have also released the redacted information concerning the individual FOIA requester. The fact that an agency may make differing privacy analyses concerning different individuals named in a document does not mandate that the agency release the names of all individuals. *See Neil Mock and Scott Lebow*, 28 DOE ¶ 80,138 at 80,587 (January 19, 2001) (Case No. VFA-0632). The privacy interest for different individuals or employee classes under Exemption 6 will always be dependent on the context in which it has been asserted.⁴ *Id.* In the present case, SC decided to make a discretionary release of the contractor employees' information. *See* Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008). Even if SC erred in releasing this information concerning contractor employees, it does not change the fact that a private FOIA requester making a request in his or her own name has a privacy interest in remaining anonymous. *Cf. Silets v. Dep't of Justice*, 945 F.2d 227, 230-31 (7th Cir. 1991) (deciding to affirm the withholding of an individual first-party FOIA requester's name pursuant to Exemption 7(C)). There is little if any public interest in the release of the full name and personal information of the FOIA requester in this case, since release of the information would shed no additional information on the operations and activity of government in the processing of FOIA Request No. 06-181-A. Thus, balancing the privacy interest involved in this cases against the scant public interest, we find that SC properly withheld identifying information about the requester in the Category 2 documents.

With regard to Document Nos. 37 and 39, SC's Determination Letter does not, in fact, list them as documents from which information has been withheld pursuant to Exemption 6. However, the copies of these two documents themselves indicate that information was withheld under Exemption 6. The information withheld under Exemption 6 in these documents is of the same type as the other Exemption 6 information withheld in the other documents and, as discussed above, was properly withheld.

B. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 11384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Milner*, 17 DOE ¶ 80,102 (January 22, 1988) (Case No. KFA-0153).

We contacted the FOIA Officer to ascertain the scope of the search that was made for responsive documents. The FOIA Officer informed us that with regard to the Category 1 documents, each of the five named employees was contacted and each made a search of his or her E-mails and

⁴ We offer no opinion as to the propriety of the release of the information concerning contractor employees in the Category 2 documents.

other documents to see if responsive documents existed.⁵ Only one employee found a responsive document and that document was provided to Apodaca. None of the five named employees knew of any investigation that was conducted pursuant to the Przybylek E-mail. No search at the Y-12 plant was conducted since, based on the information she had obtained, the FOIA Officer had no expectation that responsive documents would be located at that facility. Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008).

With regard to the search for Category 2 documents, the FOIA Officer went to the Office of Public Affairs where the requested FOIA file (Case No. 06-181-A) was located and provided Apodaca with all documents in that file (after redacting various documents pursuant to Exemption 6). With regard to the attachments referenced in Apodaca's appeal, no copies were found in the file and the FOIA Officer had no knowledge that other copies would exist in any location other than in the file itself. Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008).

Our review of the search that was conducted for documents responsive to Apodaca's appeal leads us to conclude that SC made an adequate search for documents. In the search for Category 1 documents, SC contacted each of the five named employees and had searches made for responsive documents. Further, none of the employees had any knowledge that any type of investigation had been made related to the Przybylek E-mail. As to the search for Category 2 documents, SC provided Apodaca with all documents in the requested FOIA file and there was no expectation that other documents would exist outside of that file. The adequacy of SC's search for Category 2 documents is not impaired by the fact that attachments to two of the documents could not be located. *See Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate"). In sum, SC conducted an adequate search reasonably calculated to discover responsive documents.

C. Segregability

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). We find that SC complied with the FOIA's segregability requirement by releasing to Apodaca all portions of the documents not withholdable under Exemption 6.

III. Conclusion

We find that SC conducted an adequate search for documents responsive to Apodaca's FOIA Request. Additionally, SC properly withheld information in the documents provided to Apodaca under Exemption 6. Consequently, Apodaca's appeal should be denied.

⁵ The author of the Przybylek E-mail, Tyler Przybylek, was no longer employed at DOE's Oak Ridge facility at the time SC conducted a search for responsive records. Memorandum of telephone conversation between Carolyn Becknell, FOIA Officer, SC, and Richard Cronin, Attorney-Examiner, OHA (June 26, 2008).

It Is Therefore Ordered That:

(1) The Appeal filed on May 20, 2008, by Terry Apodaca, OHA Case No. TFA-0258, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 3, 2008